Supreme Court, U. S.
FILED
SEP 3 1974
MICHAEL RODAK, JR., CLERK

No. 73-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner,
v.
THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DENNIS M. FLANNERY
1666 K Street, N.W.
Washington, D. C. 20006

JOHN F. DIENELT
1101 17th Street, N.W.
Washington, D. C. 20036

JOSEPH N. ONEK
1751 N Street, N.W.
Washington, D. C. 20036

Attorneys for Respondents The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
QUESTION PRESENTED	1
INTRODUCTION	2
STATEMENT	2
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	14
1. An Award of Fees in the Circumstances of This Case Is Consistent With Principles Previously Established by This Court	14
2. There Is No Conflict Among Circuits	17
3. There Is No Present Need for This Court To Articulate More Specific Guidelines	19
4. The Subsidiary Issues Raised by Alyeska Do Not Warrant Review by This Court	20
CONCLUSION	23

INDEX—Continued

CITATIONS

	Page
Constitution:	
U.S. Const. art. 4, § 3, cl. 2	5
Cases:	
Bradley v. *School Board*, 472 F.2d 318 (4th Cir. 1972), *vacated*, 94 S.Ct. 2006 (1974)	18
Brandenburger v. *Thompson*, 494 F.2d 885 (9th Cir. 1974)	18
Clark v. *American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971)	21-22
Cooper v. *Allen*, 467 F.2d 836 (5th Cir. 1972)	18
Donahue v. *Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973)	18
F.D. Rich Co. v. *United States*, 94 S.Ct. 2157 (1974)	15, 18, 20
Fowler v. *Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974)	18
Gilson v. *Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964)	21
Globus v. *Jaroff*, 279 F. Supp. 807 (S.D.N.Y. 1968)	21
Hall v. *Cole*, 412 U.S. 1 (1973)	15, 16, 20, 22
Knight v. *Auciello*, 453 F.2d 852 (1st Cir. 1972)	18
Lea v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971)	22
Lee v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971)	21
McEnteggart v. *Cataldo*, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972)	21
Miller v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970)	21
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	15-16, 20, 22
Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968)	15

INDEX—Continued

	Page
Parham v. *S.W. Bell Co.*, 433 F.2d 421 (8th Cir. 1970)	21
Sierra Club v. *Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973)	20
Switzer Bros., Inc. v. *Chicago Cardboard Co.*, 252 F.2d 407 (7th Cir. 1958)	21
Wilderness Society v. *Hickel*, 325 F. Supp. 422 (D.D.C. 1970)	4, 5
Wilderness Society v. *Morton*, 479 F.2d 842 (D.C. Cir.), *cert denied*, 411 U.S. 917 (1973)	2, 4, 8-9, 12
Statutes:	
Pub. L. No. 93-153, 87 Stat. 577 *et seq.*	11, 12
Mineral Leasing Act of 1920, 30 U.S.C. § 185	*passim*
National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*	*passim*
Rules:	
S. Ct. R. 19	2
Legislative Material:	
H.R. Rep. No. 93-414, 93d Cong., 1st Sess. (July 28, 1973)	10, 11
Hearings on S.970, S.993, and S.1565 Before the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess., pt.4 (May 3, 1973)	11
S. Rep. No. 93-207, 93d Cong., 1st Sess. (June 12, 1973)	11
Other Citations:	
N.Y. Times, May 26, 1974, § 1	4, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner,

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether it was an abuse of discretion for the court of appeals to authorize a partial award of attorneys' fees to respondents whose efforts compelled petitioner to obtain constitutionally-required congressional approval for the Trans-Alaska pipeline and to institute massive improvements in its technical design and environmental safeguards.

INTRODUCTION

The decision below represents a concluding chapter in the adjudication of the Trans-Alaska pipeline controversy by the Court of Appeals for the District of Columbia Circuit. The decision on the merits is contained in the court of appeals' landmark opinion, *Wilderness Society* v. *Morton*, 479 F.2d 842 (D.C. Cir. 1973). This Court denied certiorari on the merits without dissent. 411 U.S. 917 (1973).

The present petition for certiorari should similarly be denied for traditional reasons set forth in Rule 19 of the Rules of this Court. There is no conflict among circuits. The court of appeals did not interpret any federal or state statute. And the amount of fees actually to be awarded awaits further action by the district court on remand.

Most importantly, the decision below [1] rests on the unusual factual circumstances of a particular case. An understanding of those facts—which the court of appeals correctly characterized as "extraordinary"—requires a fuller statement than that set forth in the Petition. That statement demonstrates that the partial award of fees in this case was correct and fully consistent with principles previously established by this Court.

STATEMENT

The Trans-Alaska oil pipeline has come to be recognized as the "most complex" and "most ecologically

[1] The decision, which is set forth in an Appendix to the Petition, is now also reported at 495 F.2d 1026. Citations to it will be made both to the official report and to the Appendix (hereafter referred to as "Pet. App.").

sensitive" engineering project ever attempted.[2] Its construction across the public lands of the United States will now be subjected to stringent conditions imposed by the Congress, including technological and environmental safeguards intended to reflect the enormity of the undertaking. As recently summarized:

> "[C]ompanies that originally proposed to sink a hot pipeline in tricky permafrost as if it were just another pipeline [have] changed course . . . .
>
> * * * *
>
> "The pipe has [now] been tested . . . and . . . exposed . . . to check its effects on permafrost and . . . the effect of the permanently frozen ground on the pipe. The research has included studies on permafrost thaw bulbs, flood plains, rivers, oil spills, seismic and thermal stresses. . . .
>
> "Fifty per cent of the pipeline will now be elevated instead of 10 per cent, as originally envisaged. Disturbed land will be revegetated. . . . In places where the pipe would have been elevated for engineering purposes, it will now

[2] Statement of Undersecretary of the Interior, William T. Pecora, contained in record below at P. Docs. III, Tab B, at 4.

The pipeline will traverse the entire State of Alaska. For most of its 800-mile journey (641 miles of which cross federal public lands), the pipeline will travel through areas of intense seismic activity; it will intersect previously untouched wilderness areas, climb mountains, ford and span hundreds of rivers and streams; and it will affect, in varying degrees, millions of birds, fish, mammals, and other forms of wildlife.

be buried and refrigerated so that caribou can cross." [3]

The circumstances under which the Trans-Alaska pipeline will be constructed are, in short, a far cry from what would have obtained if respondents had not vigorously pursued the successful litigation, culminating in the court of appeals' decision in *Wilderness Society* v. *Morton*, *supra*, 479 F.2d 842, that preceded the decision here in issue.

Petitioner, Alyeska Pipeline Service Company, is a consortium owned by ARCO Pipeline Company, Humble Pipeline Company, Sohio Pipeline Company, Mobil Pipeline Company, Phillips Petroleum Company, Amerada Hess Corporation, and Union Oil of California. On June 6, 1969, Alyeska's principals presented the Interior Department with a map, some miscellaneous papers, a check for $10, and an application to begin construction. Although they recognized from the outset that the project they were proposing could not meet the conditions that Congress had imposed on private pipelines across the public lands and they possessed only the most general concepts of Arctic pipeline technology, they nonetheless proposed that construction begin immediately.

When it was announced in March, 1970, that the first phase of pipeline construction was imminent, respondents — three non-profit organizations — filed suit and obtained a preliminary injunction. *Wilderness Society* v. *Hickel*, 325 F. Supp. 422 (D.D.C. 1970). The injunction was premised on two grounds: (1) that Congress as the exclusive constitutionally

[3] N.Y. Times, May 26, 1974, § 1 at 34, cols. 3, 4.

designated guardian of the public lands (Art. 4, § 3, cl. 2) had established limitations in the Mineral Leasing Act on the diversion of those lands to private pipeline use and that the massive deviation from those limitations proposed by Alyeska's principals could not be effected without congressional approval; and (2) that none of the environmental and other safeguards set forth in the National Environmental Policy Act had as yet been applied to the project. 325 F. Supp. at 424.

Standing alone, this action by respondents conferred monumental benefits on the public generally and on Alyeska specifically. For, as Russell E. Train (then Chairman of the President's Council on Environmental Quality, now Administrator of the Environmental Protection Agency) has asserted:

> "The problems of constructing a pipeline across one of the most seismically active and remote areas of the world are . . . very real. These and other significant problems were simply not adequately faced in the initial proposal presented to the Department of the Interior in 1969.
>
> "If the pipeline had been constructed using the original design specifications, it would very likely have resulted in not only very serious environmental damage but also serious operational problems. *Indeed, the physical integrity of the pipeline itself was very much at stake.*" (Emphasis added.) [4]

[4] Statement before the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973, quoted at 495 F.2d 1033 n.3; Pet. App. 12a n.3. More bluntly, but to the same

Respondents' early initiative proved, however, to be only the beginning of the responsibilities they were compelled to shoulder. Despite the warning of the preliminary injunction, no effort was made to seek congressional approval for the Alaska pipeline. Moreover, despite the attention that respondents had drawn to the enormous technological and environmental complexities of the proposed undertaking, Alyeska was not yet prepared to grapple realistically with those complexities.

Respondents, therefore, again undertook important public responsibilities when, on January 15, 1971, the Interior Department published a "draft impact statement" on the pipeline. That statement, discovery disclosed, had been radically revised at Alyeska's behest before publication to delete or soften numerous negative observations about Alyeska's proposal.[5] At substantial cost and effort, respondents arranged for expert witnesses in a broad range of technological, environmental, and other disciplines to appear at public hearings and explain the numerous shortcomings and omissions that remained in Alyeska's proposal.[6]

---

effect, former Secretary of the Interior Hickel has been quoted recently as asserting that: "That first pipeline wouldn't have just been an environmental disaster. . . . It would have been a total engineering disaster." N.Y. Times, May 26, 1974, § 1, at 34, col. 4.

[5] See Deposition of Deputy Undersecretary of the Interior Jack O. Horton at 101-02, 111-12 and Exhibits A-E thereto.

[6] The public hearings were held by the Department of the Interior in Washington, D.C., and Anchorage, Alaska, in February 1971.

Only after these public hearings were serious efforts undertaken to explore the technological[7] and environmental[8] ramifications of Alyeska's proposal. The results of these undertakings were released to the public on March 20, 1972, in the form of a 6-volume Environmental Impact Statement and 3-volume Economic and Security Analysis.

On May 11, 1972, the Secretary of the Interior announced that Alyeska would be authorized to commence pipeline construction. On the following day, May 12, 1972, respondents sought summary judgment on the threshold Mineral Leasing Act issue.[9] Alyeska, however, which had entered the litigation on September 21, 1971, and thereafter assumed a leading role in the litigation, vigorously opposed the Motion. Alyeska argued that the Mineral Leasing Act "issues and those relating to the National Envi-

---

[7] Deposition of Dr. Frederick Sanger, Chairman of the Interior Department's Technical Advisory Board at 8.

[8] Deposition of Dr. David A. Brew, Chairman of the Interior Department's Environmental Impact Statement team, at 7, 88-89.

[9] Respondents' Motion stated in pertinent part:

> "The grounds for [respondents'] motion are that the Mineral Leasing Act issues present threshold questions . . .; the NEPA issues need be adjudicated only if the permits contemplated by the Secretary are not prohibited by the Mineral Leasing Act; and if said permits are prohibited by the Mineral Leasing Act, it would be a waste of judicial time and effort for [the] court to adjudicate the far more complicated NEPA issues which would, in that event, be reduced to hypothetical questions." Motion of Respondents for Partial Summary Judgment, May 12, 1972, at 1.

ronmental Policy Act . . . are inseparably associated with the technical details of how the trans-Alaska pipeline system will be built" and that the presentation to the court of both sets of issues was essential to a "full factual understanding of the project." [10]

The result was the preparation and presentation to the court of "a record and a set of briefs" on both the Mineral Leasing Act and National Environmental Policy Act issues "commensurate with the multi-billion-dollar project at stake." *Wilderness Society* v. *Morton*, *supra*, 479 F.2d at 846. And, following a five-month review of the "entire fact picture" that Alyeska had contended was necessary for a "fully informed" judgment,[11] the court of appeals concluded, in its exhaustive 50-page opinion issued on February 9, 1973:

> "Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory [or] other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations." 479 F.2d at 891.
>
> * * * *
>
> "These companies have now come into court, accompanied by the executive agency authorized to administer the statute, and have said, 'This is not enough land; give us more.' We have no

[10] Motion of Alyeska Pipeline Service Company to Place Respondents' Motion for Partial Summary Judgment in Abeyance, May 17, 1972, at 7-8.

[11] *Id.* at 8.

> more power to grant their request, of course, than we have the power to increase congressional appropriations to needy recipients." *Ibid.*
>
> * * * *
>
> "Congress intended to maintain control over pipeline rights-of-way and to force the industry to come back to Congress if the amount of land granted was insufficient for its purposes. *Id.* at 892.

The court further determined that the National Environmental Policy Act issues, while "complex and important" in their own right and having served as a predicate for a "precise analysis" of the controlling Mineral Leasing Act questions, were not themselves "ripe for" adjudication." 479 F.2d at 889; 495 F.2d at 1035, Pet. App. at 17a.

Petitions for Certiorari were filed on March 9, 1973. Respondents' opposition, filed on March 28, 1973, asserted in pertinent part:

> "[T]he petitioners could not convince even one of the judges [below] that the relief they seek should be obtained from the courts, rather than from the Congress.
>
> * * * *
>
> "Petitioners should take their case for obtaining use of the public lands to Congress, where the policy issues they raise in their briefs may be debated and resolved on the merits.
>
> * * * *
>
> "The critical point is that Congress will, by adopting or refusing to adopt any of several pending legislative solutions, dispose of each of the policy issues—including the basic issue of whether the energy needs of the country . . .

> require immediate construction of the Alaska Pipeline—that petitioners have urged upon this Court as reasons for granting review." (Footnote omitted.)[12]

Five days later, on April 2, 1973, this Court denied certiorari, without dissent. 411 U.S. 917.

With its jurisdiction over the public lands preserved, Congress embarked upon intensive deliberations concerning the construction of the proposed Trans-Alaska pipeline. In language that mirrored that of the court of appeals, Congress concluded that:

> "It is fitting and proper for Congress to make this decision. The issue is of national importance. The issue involves the use of the public lands, the control of which the Constitution expressly reserves to Congress. It is the responsibility of Congress to decide whether the pipeline should be authorized."[13]

More than ten months of hearings and debate convinced Congress that, while additional delay in the construction of the Trans-Alaska pipeline was not justified as a matter of policy, the four-year delay that had occurred had produced important benefits:

> "[T]he risk of environmental damage . . . has been substantially lessened as a result of the stricter environmental stipulations, redundant safety systems, contingency planning and better

[12] Brief in Opposition to the Petitions for Certiorari in Nos. 72-1227, 1228, 1229, at 2, 9, 18-19 (October Term, 1972).

[13] H. R. Rep. No. 93-414, 93d Cong., 1st Sess. 14 (July 28, 1973).

> engineering imposed upon the proposed Trans-Alaska pipeline."[14]

Accordingly, Congress determined "under [its] constitutional authority . . . to control the use of public lands, that . . . the Trans-Alaskan pipeline is in the national interest"; that the pipeline could now be subjected to "more safeguards than ever have been required for pipelines"; and that "further litigation over the environmental issue . . . is not justified."[15]

Public Law No. 93-153, 87 Stat. 577 was, therefore, enacted into law on November 16, 1973. It set forth a completely new charter for pipelines crossing public lands and specifically authorized, subject to the terms and conditions set forth in the Act, the construction of the Trans-Alaska pipeline without

[14] S. Rep. No. 93-207, 93d Cong., 1st Sess. 18 (June 12, 1973).

These benefits were acknowledged by some of the pipeline's most ardent supporters. See, *e.g.*, Statement of Senator Gravel, *Hearings on S.970, S.993 and S.1565 Before the Senate Committee on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4, at 56 (May 3, 1973) ("While the four-year delay in construction of the Alaska Pipeline has been costly to the United States in balance of payments and a worsening energy shortage, it has—and I think most of us agree, including the oil industry—served a very useful purpose. A safer line will be constructed today than could have been constructed four years ago."); Statement of (then) Under Secretary of the Treasury William E. Simon, *Hearings on S.970, S.993 and S.1565 Before the Senate Committee on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4, at 127 (May 3, 1973) ("past delays and resultant research have greatly reduced the magnitude of [the] risks").

[15] H. R. Rep. No. 93-414, 93d Cong., 1st Sess. 11, 15, 14 (July 28, 1973).

further action under the National Environmental Policy Act.

On April 4, 1974, the court of appeals determined that the factual circumstances of the litigation that culminated in its decision in *Wilderness Society* v. *Morton*, *supra*, 479 F.2d 842, were "extraordinary" and supported a partial award of attorneys' fees. 495 F.2d at 1026, 1031; Pet. App. at 1a, 7a. The court explained that respondents, with no hope of obtaining monetary damages, had been compelled to undertake a legal effort of "monumental proportions" to "forc[e] Alyeska to go to Congress." 495 F.2d at 1032, 1033; Pet. App. at 10a, 12a. Respondents' suit had consistently served as a "catalyst to effect change" in the environmental and technological aspects of the pipeline. 495 F.2d at 1034-35; Pet. App. at 14a-16a. And, more directly, having preserved for Congress its "primary responsibility . . . under the Constitution to regulate the use of public lands," respondents' legal efforts had given Congress the opportunity to enact "important new requirements designed to protect the public interest" —such as "elaborate specific procedures . . . to ensure protection of environmental interests" (Pub. L. 93-153, § 101); the imposition of strict liability "for damages resulting from use of the right-of-way" (Pub. L. 93-153, § 204); and the requirement that Alyeska "maintain a $100,000,000 liability fund to satisfy . . . claims" (Pub. L. 93-153, § 204(c)(5)). 495 F.2d at 1033-34; Pet. App. 11a-13a.

The court concluded that whether it looked to "the Mineral Leasing Act . . . issues upon which the court rested its opinion declaring the pipeline unlawful,

or the National Environmental Policy Act (NEPA) issues which the court left undecided," respondents had "advanced and protected in a very concrete manner substantial public interests." 495 F.2d at 1032, 1036; Pet. App. at 11a, 17a-18a.

The "equities of this particular case" justified, in the court's view, a partial "fee shifting" from respondents to Alyeska. As the court explained, Alyeska's principals first "persuad[ed] the Interior Department to grant the rights-of-way" and then Alyeska "intervened in th[e] litigation to protect its massive interests." Once in the litigation, Alyeska not only participated "actively" as a "major and real party" (Alyeska filed some 334 printed pages of briefs with the court of appeals and was allocated the major portion of the oral argument that preceded the court of appeals' decision on the merits), but was a moving force in requiring respondents "to brief and argue an issue which, because of their very success on the Mineral Leasing Act issue, never became ripe for adjudication." 495 F.2d at 1036, 1035; Pet. App. at 18a, 17a.

In its limited ruling, the court of appeals allowed no award of attorneys' fees to respondents for the thousands of man hours expended by their counsel prior to Alyeska's intervention; nor for any legal effort not related directly to the preparation and presentation of the briefs and oral argument that served as the basis for the court of appeals' decision on the merits. Even with regard to the latter, the court limited the award against Alyeska to "half of

the total fees," [16] the "amount to . . . be fixed in the first instance by the District Court, after hearing evidence if necessary as to the extent and the nature of the services rendered." 495 F.2d at 1036; Pet. App. at 19a.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. An Award of Fees in the Circumstances of This Case Is Consistent With Principles Previously Established by This Court.

The court of appeals' partial award of fees is fully consistent with principles previously established by

[16] As the court explained:

> "Under 28 U.S.C. § 2412 . . . no attorneys' fees can be imposed against the United States . . . .
>
> "Fee shifting under the private attorney general theory, however, is not intended to punish law violators, but rather to ensure that those who have acted to protect the public interest will not be forced to shoulder the entire cost of litigation. *Cf. Hall* v. *Cole, supra*, 412 U.S. at 14. . . . Since Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees. . . . *In recognition of the Government's role in the case, on the other hand, Alyeska should have to bear only half of the total fees. The other half is properly allocated to the Government and, because of the statutory bar, must be assumed by appellants* [*i.e.* respondents]. In this manner the equitable principle that appellees [*i.e., Alyeska*] bear their fair share of this litigation's full costs and the congressional policy that the United States not be taxable for fees can be accommodated." (Emphasis added.) (Footnote omitted.) 495 F.2d at 1036; Pet. App. at 18a-19a.

this Court concerning the authority of federal courts to determine whether "special circumstances exist that would justify an award of attorneys' fees." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970). This Court has repeatedly held that "federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require." *E.g., Hall* v. *Cole*, 412 U.S. 1, 4-5 (1973). The Court has also recognized that one equitable factor that has been applied in support of an award of fees is the extent to which "the expense of litigation may often be a formidable if not an insurmountable obstacle to the private litigation necessary to enforce important public policies." *F. D. Rich Co.* v. *United States*, 94 S.Ct. 2157, 2165 (1974) (footnote omitted).

In *Hall* v. *Cole, supra*, which involved provisions authorizing private suits under federal labor law, the Court noted that the unavailability of fees might be construed as "tantamount to repealing the Act itself by frustrating its basic purpose." 412 U.S. at 13. *Compare Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.")

To be sure, an award of attorneys' fees remain the exception rather than the rule. See *F. D. Rich Co.* v. *United States, supra.* Yet, the authority of federal courts to award fees may be exercised when "overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co.*, 396

U.S. at 391-392.[17] Such "overriding considerations" are plainly present here.

The court of appeals' decision sets forth in great detail the overriding considerations that led the court —on the basis of its extensive familiarity with the massive and complex record compiled below—to make a partial award of fees. The most salient of those considerations is the simple fact that were it not for respondents' efforts in this litigation the Alaska pipeline would not have been subjected to the conditions that Alyeska now cites as justifying its construction.

At a time when "commitment to improving and protecting our national environment is one of the most vital of current national policies," 495 F.2d at 1034; Pet. App. at 13a, a potential disaster was averted only because respondents, with no hope of recovering monetary damages, undertook "meritorious litigation . . . of monumental proportions." 495

[17] As the Court recently stated in *Hall* v. *Cole*, *supra*, 412 U.S. at 4-5:

> "Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation.' *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.' *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970); see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967)." (Footnote omitted.)

F.2d at 1032; Pet. App. at 10a.[18] In such a case, where an award of fees "would not have unjustly discouraged [a defendant such as] Alyeska from defending its case in court" and "denying fees might well have deterred [plaintiffs such as respondents] from undertaking the heavy burden of . . . litigation," it does not constitute an abuse of discretion for a court to determine that the equities of the case favor "an award of attorneys' fees to the successful plaintiffs." 495 F.2d at 1036; Pet. App. at 17a-18a.

2. There Is No Conflict Among Circuits.

There is no conflict among circuits for the Court to resolve in this case. Every circuit that has addressed the question and whose decision remains undisturbed has followed the approach taken by the District of Columbia Circuit in the instant case and concluded that in appropriate circumstances a proper rationale for fee shifting may, as this Court recently summarized, be "based on the premise that the ex-

[18] As the Honorable Russell E. Train summarized in his remarks before the Joint Judicial Conference of the Eighth and Tenth Circuits at 5 n.4, *supra*:

> "In all honesty, the process has been one of learning for both industry and government. I believe that industry seriously underestimated the real technical difficulties of the task and failed to appreciate fully—particularly at the outset—the new conditions for decision-making in matters that substantially affect the environment. On its part, government was ill-equipped both institutionally and informationally for dealing with the complex problems of the pipeline. Few would now contend that the Interior Department's first response to NEPA on the pipeline right-of-way application was really adequate.

pense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies." *F. D. Rich Co.* v. *United States*, *supra*, 94 S.Ct. at 2165.

The two most recent circuits to have done so are the Eighth and the Ninth Circuits. *Fowler* v. *Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974); *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974). *Accord Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972); and cases cited in *F. D. Rich*, *supra*, 94 S.Ct. at 2165 n.18.[19]

Indeed, even the dissenting judges in the instant case implicitly endorsed the validity of the majority's articulated rationale for fee shifting. In breaking with the majority, they focused instead on whether respondents in fact had conferred a public benefit by delaying construction of the pipeline. 495 F.2d at 1041, Pet. App. at 30a (MacKinnon, J.); 495 F.2d at 1042, Pet. App. at 32a-33a (Wilkey, J.). Surely, this factual question does not require review by the

[19] An arguably contrary Fourth Circuit decision in *Bradley* v. *School Board*, 472 F.2d 318 (4th Cir. 1972), on which petitioner relies, was vacated by this Court in an opinion reported at 94 S.Ct. 2006 (1974). While primarily concerned with whether Section 718 of Title VII of The Emergency School Aid Act, 20 U.S.C. § 1617, should be applied retroactively to petitioners, the Court noted that "[i]n this litigation the plaintiffs may be recognized as having rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large . . . ." 94 S.Ct. at 2019.

Supreme Court, and Alyeska does not suggest otherwise.

3. There Is No Present Need for This Court To Articulate More Specific Guidelines.

The lower federal courts are now in the early stage of evolving an equitable standard that appears fully consistent with the established principles of this Court. No trend toward the automatic or unthinking award of fees emerges from these decisions.[20] Rather, the various federal courts that have addressed the issue, including the court of appeals here, have examined the particular facts involved in each case to determine whether an exceptional decision, awarding fees, was warranted.

Alyeska itself appears to recognize both the early stage of development of the equitable standard at issue here and its consistency with traditional equitable principles. Alyeska would, however, limit the rationale to areas not of direct concern to it—*i.e.*, to "civil rights and reapportionment cases." Petition for Certiorari, at 9. But the equitable factors that have supported awards of fees in civil rights and reapportionment cases are not unique to those cases. And Alyeska provides no principled basis for distinguishing such cases from others posing similar overriding considerations of equity. Alyeska's position, in fact, is simply that unless a statute specifically

[20] Alyeska's assertion that the court of appeals' decision would extend "[the private attorney general doctrine] to virtually all cases in which compliance with federal laws is successfully challenged" is totally inconsistent with the reasoning and holding of the court of appeals. *Compare* Petition for Certiorari at 10-11 *with* 495 F.2d at 1031-32; Pet. App. at 7a-11a.

provides for fees courts should not award them when private litigation has been necessary to enforce important public policies. This position applies to civil rights and reapportionment cases, as well as to the decision Alyeska seeks to reverse. It appears on its face to be in conflict with numerous decisions by this Court. See, *e.g.*, *F. D. Rich Co.* v. *United States*, *supra*, 94 S.Ct. at 2165; *Hall* v. *Cole*, *supra*, 412 U.S. at 4-5; *Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 391-392.

In sum, the action of the court of appeals in this case is completely consistent with principles previously articulated by this Court and with the recent decisions of other federal courts. The cases are uniform in their approach and comparatively few in number and any argument that they will stimulate litigation unduly or impair government decision-making is purely speculative. Under these circumstances, there is no present need for this court to grant certiorari in order to lay down more specific guidelines.

4. The Subsidiary Issues Raised by Alyeska Do Not Warrant Review by This Court.

a. Alyeska's contention that respondents should not be given an award for issues on which they did not prevail ignores entirely the bases of the decision of the court of appeals—that respondents' environmental efforts served as a catalyst for change and are reflected in the conditions that will now govern the pipeline's construction;[21] that the Mineral Leasing Act issues on which respondents clearly prevailed were interrelated with the National Environmental Policy Act issues;[22] and that, to the extent respondents litigated issues that never became ripe for adjudication, they did so at Alyeska's insistence.[23] 495 F.2d at 1035; Pet. App. at 17a.

b. Alyeska's objection to the amount that may be awarded is clearly speculative at this time since that matter has been referred to the district court for further exploration. The general guidelines set down by the court of appeals are, however, identical to those articulated by the Fifth Circuit in numerous analogous situations.[24]

---

[21] *Accord Sierra Club* v. *Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973) (fee award to unsuccessful plaintiffs in environmental action because legal action spurred improvements in environmental related aspects of design for real estate development). *Compare McEnteggart* v. *Cataldo*, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972) (fees assessed against defendants who prevailed on appeal, where plaintiff was forced to go to court to claim statement of reasons to which he was constitutionally entitled); *Parham* v. *S.W. Bell Co.*, 433 F.2d 421 (8th Cir. 1970) (attorneys' fees awarded where lawsuit served as catalyst even though no injunction was issued); *Globus* v. *Jaroff*, 279 F. Supp. 807 (S.D.N.Y. 1968) (attorneys' fees awarded although case found to be moot). *Cf. Gilson* v. *Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964).

[22] A position that petitioner itself espoused at an earlier stage of the litigation. See pp. 7-8, *supra*.

[23] See p. 7, *supra*. *Compare Switzer Bros., Inc.* v. *Chicago Cardboard Co.*, 252 F.2d 407 (7th Cir. 1958).

[24] See, *e.g.*, *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534, 538 (5th Cir. 1970) (award of attorneys' fees rests on existence of attorney-client relationship, not on obligation of plaintiffs to pay fees). See *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Clark* v. *American Ma-*

c. Finally, Alyeska's contention that the Fifth Amendment bars the collection of attorneys' fees against it is frivolous. This Court has often upheld the award of attorneys' fees against private parties on the ground that the plaintiffs' lawsuit has served a public purpose. See, *e.g.*, *Hall* v. *Cole* and *Mills* v. *Electric Auto-Lite Co.*, *supra*.

In the instant case, Alyeska entered the litigation because, in its own words:

> "[I]ts interests cannot be represented adequately by existing parties; the responsibilities and duties of the Secretary of the Interior do not include or concern the proprietary and financial interests of Alyeska or the companies with whom Alyeska has contracted and for whom it is authorized to act as attorney-in-fact in connection with the applications which are the subject of this action." [25]

Surely, there is no unfairness in awarding fees against a party whose actions gave rise to the legal proceedings, who entered those proceedings to protect its own interests, and whose litigation efforts contributed substantially to the cost and complexity of the proceedings.

---

rine Corp., 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971). *Accord Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971).

[25] Motion of Alyeska Pipeline Service Company to Intervene as a Defendant, August 20, 1971, at 4.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DENNIS M. FLANNERY
1666 K Street, N.W.
Washington, D. C. 20006

JOHN F. DIENELT
1101 17th Street, N.W.
Washington, D. C. 20036

JOSEPH N. ONEK
1751 N Street, N.W.
Washington, D. C. 20036

Attorneys for Respondents
The Wilderness Society,
Environmental Defense Fund,
Inc., and Friends of the Earth

September 1974